95-459

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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1994

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WILLIAM H. REPLOGLE,
Petitioner,

VS.

PENNSYLVANIA CIVIL SERVICE COMMISSION,
Respondent.

* * * * * *

PETITION FOR WRIT OF CERTIORARI
TO THE COMMONWEALTH COURT OF PENNSYLVANIA

* * * * * *

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27 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE IMPOSITION OF SANCTIONS ON A CIVIL SERVANT FOR ASSOCIATING HIMSELF WITH OTHER CANDIDATES FOR A SCHOOL BOARD POSITION VIOLATES HIS FIRST AMENDMENT RIGHTS, WHERE HE HAS BEEN PERMITTED TO BE A CANDIDATE?

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OPINION OF THE LOWER COURT

The opinion of the Commonwealth Court of Pennsylvania is set forth as an appendix to this Petition. It is reported at 657 A.2d 60 (1995), *alloc. denied*, 661 A.2d 876 (1995).

STATEMENT OF JURISDICTION

The judgment of the Commonwealth Court of Pennsylvania was entered on January 27, 1995. A timely Petition for Allowance of Appeal was filed in the Supreme Court of Pennsylvania on February 14, 1995, which was denied by Order of that Court on June 20, 1995.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

STATUTES INVOLVED

(b) ... Activities prohibited by this subsection include, but are not limited to, the following activities:

* * *

(7) Soliciting votes in support of or in opposition to a candidate for public office in a partisan election or a candidate for political party office.

* * *

(10) Endorsing or opposing a candidate for public office in a partisan election or a candidate for political party office in a political advertisement, a broadcast, campaign, literature or similar material.

71 P.S. § 741.905b (b)

notwithstanding anything in this section or any other act to the contrary, no person shall be deemed ineligible for the office of school director solely on the basis that such person is a member of the classified service under this act.

71 P.S. § 741.905b (d)

STATEMENT OF THE CASE

Petitioner, William H. Replogle, was employed by the Commonwealth of Pennsylvania, Department of Transportation as a Civil Engineer Manager and was classified as a Civil Service Employee in a merit system covered position.

On March 11, 1991, the Petitioner announced his candidacy for a position on the Spring Cove School Board. Subsequent to the March 11, 1991 announcement, a primary election was held on May 21, 1991. At the time of election for the office in the fall of 1991, the Petitioner was elected to the Spring Cove School Board and was in fact elected the President of the School Board.

Following an administrative proceeding the State Civil Service Commission found that the Petitioner handed out a small

business card with five candidates names on it, and that at a candidates night forum, the Petitioner announced his candidacy and said he was running as a member of a five member team. A thirty day suspension from employment was imposed as a penalty.

Petitioner filed a Petition for Reconsideration, raising several issues, including a claim that his First Amendment rights had been violated. The Commission on February 16, 1994, the State Civil Service Commission issued a further order, reaffirming its previous decision, from which the Petitioner appealed.

The federal questions were raised in the Petition for Reconsideration, and the Petition for Review filed in the Commonwealth Court of Pennsylvania.

ARGUMENT

Pennsylvania's Civil Service Act, 71 P.S. §741.1 *et. seq.* imposes restrictions on political activity similar to those imposed by the federal Hatch Act. One significant provision permits civil servants to stand for election to school board positions, in non-partisan elections. 71 P.S. § 741.905b (d). Petitioner, who was a candidate for a school board position, was nevertheless disciplined for having engaged in political activity, based on a finding that he had handed out a business card with five candidates names on it (including his own), and that at a candidates forum, he stated that he was running as a member of a five member team.

This is a case of first impression. The question is not whether the State may prohibit a civil servant from being a

candidate, but whether, having allowed such candidacy, he may be prohibited from associating himself with other candidates. The interpretation given the Statute by the Commonwealth Court restricts activity protected by the First Amendment and bridles political conduct because of vagueness.

The conduct of the Civil Service Commission was egregious in that the First Amendment cannot stand an intrusion where the right to participate in an election is given. The Commonwealth Court's Order abrogates the Petitioner's right to political association as well as freedom of speech, further annihilating his effort to communicate to voters his sharing of the views and goals of others.

Petitioner was accused of violating two of the prohibitions on political

activity contained in 71 P.S. § 741.905b (b). Subsection (d) of the same statute allows civil servants to hold the office of School Director.

The First and Fourteenth Amendments protect individual and collective rights of freedom of association. *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Annot., Supreme Court's Views regarding Federal Constitution's First Amendment right of association as applied to elections and other political activities.* The right to associate in a political party is entitled to particular protection. *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981).

Employment decisions which adversely affect individuals may not be made based on conduct protected by the First Amendment. *Rutan v. Republican Party of Illinois*, 497

U.S. 62, *reh. denied*, 497 U.S. 1050.

Petitioner's right to political association is directly affected by the Commission's Order. He is prohibited from listing himself as part of a ticket, with other candidates sharing common views. His right to freedom of speech is also affected; he has been penalized for communicating to the voters the fact that he shares the views and goals of the other candidates. Had he remained silent on this point, a reasonable voter would assume that Petitioner was not part of this faction, and would be misled as to his views.

Petitioner does not challenge the constitutionality of a prohibition on a civil servant running for public office; similar provisions of both the federal Hatch Act, and similar state laws have been upheld. *U.S. Civil Service Commission v.*

National Assoc. of Letter Carriers, 413 U.S. 548 (1973). *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Having been permitted to run for office, however, Petitioner's First Amendment rights guarantee him the opportunity to campaign for that office as a part of a political party, and to communicate this fact to the voters.

CONCLUSION

WHEREFORE, it is respectfully requested that the Petition for Certiorari be granted, and the decision of the Commonwealth Court of Pennsylvania reversed.

Respectfully submitted,

6/14/95
Date

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CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing document upon the persons and in the manner indicated below:

Service by first class mail addressed as follows:

Frederick Smith, Esquire
State Civil Service Commission
4th Floor
Strawberry Square Complex
Legal Office
Harrisburg, PA 17108

9/14/95
Date

Arthur Cohen, Esquire

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge
HONORABLE SANDRA SCHULTZ NEWMAN, Judge
HONORABLE SILVESTRI SILVESTRI, Senior Judge

MEMORANDUM OPINION BY
PRESIDENT JUDGE COLINS
FILED: January 27, 1995

William H. Replogle (Replogle) brings this petition for review from the February 16, 1994 Order of the State Civil Service Commission (Commission), affirming the Commission's December 22, 1993 Order imposing a thirty (30)-day suspension upon Replogle for violating Section s 905.2(b)(7) and 905.2(b)(10) of the Civil Service Act, Act of August 5, 1941, P.L. 752, as amended, 71 P.S. §§741.1 - 741.1005 (Act).[1]

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[1] Section 905.29b)(7), 71 P.S. §741.905b(b)(7), and Section 905.2(b)(10), 71 P.S. §741.905(b)(10), added by the Act of June 26, 1989, P.L. 47, provide, in

Replogle, employed as a civil engineer manager with the Department of Transportation (DOT), was also a political candidate for school board director for the Spring Cove School Board during the May 1991 primary and November 1991 general elections.[2] The findings of fact in the

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pertinent part, as follows:

> (b) [n]o person in the classified service shall take an active part in political management or in a political campaign. Activities prohibited by this subsection include, but are not limited to, the following activities:
>
> ....
>
> (7) [s]oliciting votes in support of or in opposition to a candidate for public office in a partisan election or a candidate for political party office.
>
> (10) [e]ndorsing or opposing a candidate for public office in a partisan election or a candidate for political party office in a political advertisement, a broadcast, campaign, literature or similar material.

[2] Section 905.2(d) of the Act, 71 P.S. §741.905b(d), does not prohibit Replogle himself from being a candidate for the

Commission's adjudication indicate that Replogle, along with four other school board director candidates, belonged to a group known as the Concerned Citizens for Child Safety and Learning (CCCSL).

On April 30, 1991, Replogle was the sole member of the CCCSL to attend a candidates' forum for the Spring Cove School Board election. While investigating the activities of another DOT employee who participated in this election, the Commission, by a letter to Replogle dated September 3, 1992, alleged that he had actively campaigned and participated in the election activities of the other four CCCSL candidates, in violation of the Act.

The Commission, on August 19, 1993, conducted an investigatory hearing with

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position of school director, although he is not permitted to campaign on behalf of other candidates for this office.

regard to Replogle's prohibited election activities, at which time Replogle argued that the Commission's September 3, 1992 letter was misleading in charging him with having supported a candidate in a "write-in campaign," rather than with "campaigning" in the broader sense of the word. Replogle contends that had he known about the latter, he would have prepared rebuttal testimony. Nevertheless, the record indicates that Replogle twice rejected the Commission's proposal to continue the hearing to allow him an opportunity to present defense witnesses. Ultimately, the witnesses presented by the Commission were found credible in establishing that Replogle's actions violated Section 905.2(b) of the Act. Accordingly, pursuant

to Section 905.2(f) of the Act,[3] the Commission, by an adjudication dated December 22, 1993, suspended Replogle from his employment with DOT for thirty days.

Replogle filed a petition for reconsideration. The Commission, however, by its order dated February 16, 1994, denied Replogle the relief he sought and reaffirmed its December 22, 1993 decision. This appeal followed. The decision to grant or deny a request for reconsideration is a matter of administrative discretion and as such will only be reversed for an

---

[3] Section 905.2(f) of the Act, 71 P.S. §741.905(b)(f), provides, in pertinent part, as follows:

(f) A person in the classified service who violates this section shall be removed from employment ... Provided, that, the commission at its discretion may impose a penalty of suspension without pay for at least thirty days, but not more than one hundred twenty days, if it finds that the violation does not warrant termination.

abuse of discretion. Muehleisen v. State Civil Service Commission, 66 Pa. Commonwealth Ct. 95, 443 A.2d 867 (1982), affirmed, 501 Pa. 335, 461 A.2d 615 (1983).

Replogle argues that the notice letter he received from the Commission was not sufficiently specific to apprise him of the exact prohibited political activity with which he was charged, and that the evidence presented failed to specify exactly what campaign materials on behalf of which candidates he was charged with distributing. Further, Replogle contends that because neither the statute nor Commission bulletins prohibit his running for the school board director's position, his First Amendment rights protect his right to campaign.

The Act's prohibitions on political activity are clear and reflect the "state's

interest in shielding its civil servants from potential insidious pressures." Id. at 596, 539 A.2d at 68 (1988). Although pursuant to the Act, Replogle himself is permitted to run for the position of school board director, by participating in the campaign activities of other candidates, he unequivocally violated the Act. The Commission found that Replogle, by distributing at the polls, cards listing the names of the other four candidates who were members of CCCSL, in addition to his own name, contravened the Act's prohibitions. Substantial evidence of record, as indicated by the following testimony of Gerald W. Greene and Theresa Phillips at the August 19, 1993 hearing, supports the Commission's determination.

[Direct Examination of Gerald W. Greene]

Q. Were you present at the April 30, 1991 candidates' forum held with regard to this school board election?

A. Yes, I was.

Q. Was Mr. Replogle one of the candidates present?

A. Yes, he was.

....

Q. Did all the candidates come to that?

A. No, they didn't.

Q. Was Mr. Replogle one of the candidates present?

A. Yes, he was.

Q. On that night, did Mr. Replogle only speak to his own candidacy?

A. As I recall, in Mr. Replogle's opening remarks, he announced his candidacy, and said he was running as a member of a five-member team, and that their platform was to stop foolish spending and to improve community relations.

Q. Did you vote on the May 21, 1991 primary election?

A. Yes, I did. When I went to my polling place, I was approached by Mr. Replogle, and he handed me a small business card that had red and blue printing on it, if I remember correctly. It had all five

candidates names on it and had Citizens for Quality Ed, and some little things like common sense stuff.... All five candidates names were on it.

Q. And you received this card while you were on the way to your polling place?

A. As I was entering the poll, yes.

[Direct (Rebuttal) Examination of Gerald W. Greene]

Q. We heard testimony here today by several people who indicated who was handing the cards out at that poll. So the fact that you had a card in your hand doesn't mean that only Mr. Replogle had those cards to hand-out.... So, therefore, somebody else may have gave [sic] you [a] card which you would have had in your hand?

A. I would say, no, because I remember who handed me the card.

[Direct Examination of Theresa Phillips]

Q. Were you present at the candidates' forum held Tuesday, April 30, 1991?

A. Yes, I was.

Q. Was Mr. Replogle one of the candidates present?

A. Yes, he was.

....

Q. On that night, did Mr. replogle only speak to his own candidacy?

A. No, sir, he did not.

Q. If you recall, what did Mr. Replogle speak to?

A. In his opening introduction, he said that he was running for school board director... he said that they [the other four candidates] were at a campaign strategy meeting. They could not attend, and that he was there in their place.

We further agree with the Commission's conclusion that the written notice sent to Replogle was sufficient to commence an investigative hearing, and that since Replogle rejected the Commission's two offers to continue the hearing to allow him additional preparation time, he cannot now raise a notice issue. Finally, Replogle's attempt to present a First Amendment constitutional argument in defense of his conduct is not viable and, as in Ettinger, "we likewise perceive no constitutional infirmity" in upholding herein the Act's

restrictions on the political activities of civil service employees, as reflective of public policy against undue influence. Id. at 596, 539 A.2d at 68.

In consideration of the foregoing discussion and the fact that the 30-day suspension imposed on Replogle is not so unreasonable or onerous as to constitute an abuse of discretion, the order of the Commission is affirmed.

/S/ JAMES GARDNER COLLINS,
President Judge

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

WILLIAM H. REPLOGLE,
Petitioner,

v.

PENNSYLVANIA CIVIL SERVICE COMMISSION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF THE CASE

1. Petitioner, Dennis Replogle, an employee of the Pennsylvania Department of Transportation, asks the Court to review a decision of the Pennsylvania Commonwealth Court which upheld the State Civil Service Commission's decision that he be subject to a thirty-day suspension from work for violation of the Pennsylvania Civil Service Act's prohibitions against political activity by covered state employees. Pa. Stat. Ann. tit. 71, §905b. Petitioner, permitted by an exception in the act to be a candidate in an election for school board, violated other provisions of the act in the course of running for that office. Although the act does provide that "no [member of the classified service] shall be deemed ineligible for the office of school director solely [on that basis]" Pa. Stat. Ann. tit. 71, §741.905b(d), it also prohibits employees covered by its provisions from inter alia, "soliciting votes in support of or in opposition to a candidate for public office in a partisan election or a candidate for political party office" Id., §741.905b(b)(7) and from "endorsing or opposing a candidate for public office in a partisan election or a candidate for political party office in a political advertisement, a broadcast, campaign, literature, or similar material." Id., §741.905b(b)(10).[1]

2. Following a hearing, the Civil Service Commission found that Petitioner had violated these provisions by endorsing other candidates for school board at

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[1]The act does permit covered employees to belong to political parties, attend political gatherings, express opinions "as an individual privately and publicly on political subjects and candidates," and "Otherwise participate fully in public affairs, except as provided by law, in a manner which does not materially compromise efficiency or integrity as an employee or the neutrality, efficiency or integrity of a Commonwealth Agency." Id., §741.905b(c).

public forums and by distributing cards listing their names at the polling place. The Commission concluded that Petitioner should be subject to a thirty-day suspension, the minimum penalty under the act.

The Commonwealth Court affirmed the Commission's order, concluding that the act's proscriptions on political activity were clear, and that the record evidenced Petitioner's violations. Of the issue presented in this petition, the court said only that the First Amendment arguments were "not viable" and that it perceived "'no constitutional infirmity' in upholding the Act's restrictions on the activities of civil service employees, as reflective of the public policy against undue influence." Petition, pp. 22-33, citation omitted. The Pennsylvania Supreme Court denied a petition for allowance of appeal, and petition now asks the Court to accept review of the matter by writ of certiorari.

REASON FOR DENYING THE WRIT

A. The Lower Court Correctly Decided the Issue by Application of Well Settled Principles.

Petitioner has pointed to no conflict among the lower courts as to the question presented, nor has he presented a novel or important issue such as would justify review by the Court. In affirming the decision of the Civil Service Commission, the Commonwealth Court did no more than to reaffirm, without significant discussion, the general authority of the state to limit the political activities of its employees. This holding is not controversial, and is consonant with the Court's decisions on the subject. In *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), the Court, reaffirming the constitutionality of the Hatch Act, the Court discussed its view of the permissible scope of such an act

> We unhesitatingly reaffirm the Mitchell holding that Congress had, and has, the power to prevent Mr. Poole and others like him from holding a party office, working at the polls, and acting as party paymaster for other party workers. An Act of Congress going no farther would in our view unquestionably be valid. So would it be if, in plain and understandable language, the statute forbade activities such as . . . actively participating in fund-raising activities for a partisan candidate or political party . . . becoming a partisan candidate for, or campaigning for, an elective public office;

> actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention. Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees.

Id. at 556 (emphases in original). See also, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding state version of the Hatch Act). Neither is the Commonwealth Court's decision at odds with *Rutan v. Republican Party of Illinois*, 497 U.S. 62 reh. denied 497 U.S 1050 (1990) cited by petitioner. That case holds only that promotions, transfers and recalls by low level government employees may not be based on political affiliation or support.

The Court has consistently upheld the Hatch Act and its state counterparts. The state laws are of course not uniform, and it would serve no purpose to review the decision of a state intermediate appellate court which, interpreting the provisions of one of them, does no more than echo the general principles advanced by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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DATED: October 18, 1995